LENG CHEE YEAN v. TOKIO MARINE INSURANCE (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[SUIT NO: 22NCC-1588-10-2012]
26 JANUARY 2015

INSURANCE: *Fire insurance – Claim on policy – Repudiation of liability by insurer – Whether claimant submitted fraudulent claim – Whether quantum of claim grossly exaggerated – Whether claimant made false declaration – Whether condition in policy breached – Whether insurer's repudiation of liability valid*

The defendant had issued a fire insurance policy to PHC Marine Product Trading, which was solely owned by the plaintiff to cover its 'stock-in-trade of all kind of marine products and Chinese herb, cordyceps, bird's nest and the like'. On 28 September 2011, while the fire insurance policy was still in force, all the 251.3198kg of cordyceps which was stored in the plaintiff's warehouse were destroyed in a fire. The plaintiff's claim under the fire insurance policy was, however, repudiated by the defendant. Therefore, the plaintiff filed a suit against the defendant claiming for damages and losses under the fire insurance policy in the sum of RM9,989,639.35. The defendant contended that it was not liable to the plaintiff and was entitled to repudiate all liability under the policy as: (i) the plaintiff had submitted a claim that was fraudulent and/or by occasioning the loss or damage by his wilful act or with his connivance; (ii) the quantum claimed for had been grossly exaggerated; and (iii) the plaintiff breached his duty to give a full and frank disclosure under the insurance policy which was an *uberrimae fidei* contract. The plaintiff asserted that its claim was genuine based on the costs of purchase of the cordyceps from his supplier. The plaintiff gave evidence, *inter alia*, that: (i) he had bought the 'King of Cordyceps' from China; (ii) he had physically examined the cordyceps and based on the size and the colour, it was 'King of Cordyceps'; and (iii) he was convinced that the stock that was destroyed in the fire was 'King of Cordyceps'. On the other hand, the defendant called two expert witnesses, DW1, an independent expert witness, and DW2, a consulting scientist with the forensics services, to give their expert opinion on cordyceps and to ascertain whether the insured property that was destroyed in the fire was indeed the 'King of Cordyceps'. The issues that arose for the court's determination were: (i) whether the plaintiff had a valid claim under the fire insurance policy; and (ii) whether the plaintiff had breached condition 15 of the fire insurance policy.

Held (dismissing plaintiff's case with costs):

(1) According to DW1, any cordyceps, whether sinensis or militaris or any other type, was a combination hybrid of insect and fungi. From the result of the DNA testing on two specimens of the fire affected stocks that DW1 had conducted, she found that the specimens contained only fungi (fruiting body part) but no insect (larva part). Instead, DW1 identified the two specimens of the fire affected stocks to be 'Aspergillus oryzae', that is, common mold and no genetic materials of cordyceps were detected in the specimens. DW1 concluded that the specimens of the fire affected stocks were not even cordyceps, let alone 'King of Cordyceps' or cordyceps sinensis. (paras 34, 35 & 36)

(2) DW1's scientific findings were consistent with and supported by DW2, who was of the opinion that, from the morphological analysis which concentrated on the physical features of the fire affected samples and the exemplars procured from the Chinese herb/medicine shops in Malaysia, Singapore and Philippines, the fire affected stocks of the plaintiff was not the genuine 'cordyceps sinensis' as claimed by the plaintiff. The evidence of both DW1 and DW2, who were independent witnesses, together with their reports were more reliable on the scientific analysis of cordyceps than that of PW1, who was an interested party in the proceedings. (paras 37, 38 & 41-43)

(3) It is trite law that when faced with a scientific issue, the courts are reluctant to reject uncontroverted expert evidence unless the evidence is 'obviously lacking in defensibility.' Based on the evidence of DW1 and DW2, the plaintiff had failed to establish, on the balance of probabilities, that the insured property which was destroyed in the fire was actually the 251.3198kg of 'King of Cordyceps' and thus the fire insurance policy was not triggered to respond to the plaintiff's claim. (paras 45-47)

(4) The three limbs in condition 15 were to be read disjunctively and the defendant might only show one breach in order to support its decision to repudiate the plaintiff's insurance claim. In view of the expert reports which concluded that the fire affected stock was not cordyceps, let alone 'King of Cordyceps', the plaintiff had breached condition 15 by making a false declaration that the cordyceps kept at the premise which was damaged by the fire as 'King of Cordyceps'. The defendant had therefore validly repudiated liability when the plaintiff had breached condition 15. (paras 50, 51 & 54)

(5) Premised on the expert evidence that the fire affected stocks were not cordyceps but common molds, the plaintiff was also in breach of condition 15 by submitting a grossly exaggerated claim, that the fire affected stocks was cordyceps sinensis worth more that RM9 million. (para 55)

Case(s) referred to:
PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***

For the plaintiff - Ng Chee Keong (Ooi Tiong Sieng with him); M/s Tan, Ng & Ong
For the defendant - Tan Sixin; M/s Azim, Tunku Farik & Wong

Reported by S Barathi

JUDGMENT

Azizah Nawawi J:

Introduction

[1] The plaintiff's claim against the defendant is premised on a Fire Insurance Policy No: W-F-A8-AG-009027 ('the fire insurance policy') taken by the plaintiff to cover its 'stock-in-trade of all kinds of marine products and Chinese herb, cordyceps, bird's nest and the like.' The insured sum under the insurance policy is RM10 million.

[2] The cordyceps were stored in a warehouse in Sungei Buloh. On 28 September 2011, a fire occurred at the warehouse and destroyed 251.3198kg of cordyceps imported from China which were purchased at the price of USD12,000 per kilogram. The total value of the cordyceps stock is said to be RM9,989,639.35.

[3] The plaintiff made a claim under the fire insurance policy but the same was repudiated by the defendant.

[4] The plaintiff then filed this suit to claim damages and loss under the fire insurance policy in the sum of RM9,989,639.35.

[5] After hearing the evidence and the submission of the parties, the plaintiff's case was dismissed with cost.

The Plaintiff's Case

[6] From the plaintiff's summary of case which was filed in this court, the plaintiff says that the defendant had issued the fire insurance policy to PHC Marine Product Trading ("PHC Marine") for the insured amount of RM10,000,000 for stock in trade of all kind of marine products and Chinese herbs, cordyceps, bird's nest and the like at the Address at Risk at Lot 2136D, Off Jalan Welfare, Kampung Baru Sungai Buloh, 47000 Sungai Buloh, Selangor ("Address at Risk").

[7] On 28 September 2011, while the said fire insurance policy was still in force, all the 251.3198kg of cordyceps which was stored in the Address at Risk was destroyed in a fire.

[8] The defendant appointed Mestari Adjusters Sdn Bhd ("Mestari Adjusters") to investigate the claim made by the plaintiff subsequent to the said fire incident.

[9] The defendant's contention is that it is not liable to the plaintiff and is entitled to repudiate all liability under the third insurance policy because:

(i) The plaintiff submitted a claim that is fraudulent and/or by occasioning the loss or damage by his wilful act or with his connivance;

(ii) The quantum claimed for has been grossly exaggerated;

(iii) The plaintiff breached its duty to give full and frank disclosure under the said insurance policy which is an *uberrimae fidei* contract.

[10] The plaintiff asserts that the amount claimed is genuine and based on the cost of purchase of the cordyceps from the plaintiff's supplier. At all times, the plaintiff had provided the defendant full and frank disclosure of all the facts.

[11] Further, the plaintiff asserts that whilst the plaintiff had been conducting itself in utmost good faith, it is the defendant that had breached the duty of utmost good faith by not only refusing and/or failing to pay the compensation amount to the plaintiff but also refusing to provide the plaintiff with any particulars to support their position in refusing and/or failing to pay the insurance compensation.

[12] Therefore, the plaintiff claims for:

(i) A declaration that the fire insurance police is valid and binding;

(ii) An order that the defendant pay the plaintiff the insurance compensation amount of RM9,989,639.35;

(iii) An order that the defendant pay the interest on the insurance compensation amount of RM9,989,639.35 at the rate of 4% per annum from the date of judgment until the date of full and final settlement; and

(iv) Costs on an indemnity solicitor-client basis.

The Defendant's Case

[13] From the defendant's summary of case filed in court, the defendant says that it had issued a Fire Insurance Policy No. W-F-B0-AG-011356 for the sum insured of RM10,000,000 on stock-in-trade of all kind of marine products and Chinese herb, cordyceps, bird's nest and the like with the situation of risk at Lot 2136D, Off Jalan Welfare, Kampung Baru Sungai Buloh, 47000 Sungai Buloh, Selangor (the "risk premises") for the period from 9 October 2010 to 8 October 2011 in favour of PHC Marine Product Trading ("PHC") upon the request of the plaintiff. The said fire insurance policy was issued subject to terms and conditions.

[14] A fire took place at the risk premises on 28 September 2011 and the plaintiff is now claiming against the defendant for the alleged loss and damage suffered as a result of the fire to the sum of RM9,989,639.35.

[15] The defendant rejects liability under the said fire insurance policy in respect of the plaintiff's claim based on the following reasons:

(a) That the plaintiff has breached condition 15 of the said policy by submitting a claim that is fraudulent and/or by making a false declaration in support of his claim and to obtain benefit under the said policy and/or by occasioning the loss or damage by his wilful act or with his connivance causing such loss, based on *inter alia* the following facts:

(i) In a statutory declaration affirmed by the plaintiff himself, the plaintiff has represented that the stocks destroyed in the fire were cordyceps that originated from Tibet and were of superior grade with the scientific name of "Cordyceps sinensis". However, experts' scientific examination of the stock found at the risk premises after the fire incident in fact revealed that this representation was untrue;

(ii) Investigations into the plaintiff's purported supplier in Guangzhou revealed that it did not exist at its invoice address;

(iii) Investigations into the plaintiff's purported payee companies in Hong Kong, revealed that they were either not registered or did not exist at its registered address; and/or

(iv) Investigations into the plaintiff's purported buyers, revealed that they did not in fact deal in cordyceps in general and/or they denied that they ever had any dealings with the plaintiff;

(b) That based on the above, the amount claimed for the plaintiff is false and/or deliberately exaggerated and/or in breach of condition 12 of the said policy. The freezing of the plaintiff's bank accounts under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and/or the investigations by the Inland Revenue Board of Malaysia and the Royal Malaysian Customs Malaysia as admitted by the plaintiff in his statement of claim suggests motive on the part of the plaintiff to exaggerate his claim under the said policy; and/or

(c) That the plaintiff has breached his continuing obligation to fully disclose all material facts accurately to the defendant as a contract of insurance is a *uberrimae fidei* contract ("utmost good faith") and accordingly, the defendant is entitled to repudiate liability under the said policy.

[16] The plaintiff's due observance and fulfilment of the terms and conditions of the said fire insurance policy has been made a condition precedent to the defendant's liability, if any. Therefore, the plaintiff's/PHC's breach of the abovementioned conditions entitles the defendant to reject all liabilities under the said policy.

[17] In the event that the court finds the defendant liable towards the plaintiff under the said policy, the plaintiff is put to strict proof of the actual quantum payable under the said policy.

A **The Issues To Be Tried**

[18] The issues to be tried are:

(i) Whether the Insurance Policy No. W-F-B0-AG-011356 ("insurance policy") dated 20 October 2010 entered into between PHC Marine Product Trading and the defendant was valid at the time the fire broke out at the Address at Risk on 28 September 2011.

B

(ii) If so, whether the plaintiff has:

(a) Breached condition 15 of the insurance policy as pleaded in para. 18(a) of the defence;

C

(b) Falsely and/or deliberately exaggerated the amount claimed for and/or breached condition 12 of the insurance policy; and/or

(c) Breached its continuing obligation to fully disclose all material facts accurately to the defendant at all material times.

D

(iii) Whether the defendant is entitled to reject liability in respect of the plaintiff's claim.

(iv) If issue No. (iii) is answered in the negative, whether under the said fire insurance policy:

E

(a) The plaintiff and/or PHC Marine Product Trading is entitled compensation for the loss of the said cordyceps in the sum of RM9,989,639.35; or

(b) In the alternative, the plaintiff and/or PHC Marine Product Trading is entitled to the compensation of an amount of fair value for the loss of the said cordyceps as determined by this court.

F

The Findings Of The Court

[19] It is not in dispute that the defendant has issued the fire insurance policy for the sum insured of RM10 million for 'stock-in-trade of all kinds of marine products and Chinese herb, cordyceps, bird's nest and the like' situated at the warehouse in Sungei Buloh, in favour of the plaintiff.

G

[20] It is also not in dispute that when the fire occurred on 28 September 2011 at the warehouse in Sungei Buloh, the fire insurance policy is still in force. Therefore the answer to issue (i) is in the positive.

H

[21] It is also common ground that from the fire forensics' report prepared by the defendant, it was concluded that there was no physical evidence or circumstantial evidence to indicate deliberate ignition or smoking activities at the warehouse, causing the destruction of the plaintiff's goods.

I

Issue: Whether The Plaintiff Has A Valid Claim Under The Fire Insurance Policy

[22] The first issue to be considered here is whether the plaintiff has a valid claim against the defendant under the fire insurance policy. Therefore, in order to succeed in this case, the onus is on the plaintiff to prove on a balance of probabilities that its 'property' insured under the fire insurance policy had been destroyed in the fire that occurred in the warehouse situated at Sungei Buloh.

[23] Under the preamble of the insurance policy, the defendant agrees that the insurance policy will only respond if the 'property insured described in the Schedule' should be destroyed or damaged by fire or lightning during the period of insurance. The preamble reads as follows:

> THE COMPANY AGREES subject to the Terms and Conditions contained herein or endorsed or otherwise expressed hereon that if the Property Insured described in the said Schedule or any part of such property be destroyed or damaged by FIRE or LIGHTING during the Period of Insurance stated in the Schedule or of any subsequent period in respect of which the Insured shall have paid and the company shall have accepted the premium required for the renewal of this Policy, the Company shall pay or make good to the insured the actual value of the Property Insured at the time of the happening of its destruction or the actual amount of such damage.

[24] It is common ground that the property insured as described in the policy schedule is 'stock-in-trade of all kinds of marine products and Chinese herb, cordyceps, bird's nest and the like.'

[25] It is the pleaded case of the plaintiff that the property insured which was destroyed in the fire was 251.3198kg of cordyceps worth RM9,989,639.35. In para. (5) of the plaintiff's statement of claim (SOC), the plaintiff pleads that:

> 5. Pada 28.9.2011, semasa Polisi Insurance Ketiga masih lagi berkuatkuasa, kesemua cordysep sebanyak 251.3198 kg bernilai RM9,989,639.35 yang disimpan di Alamat Risiko telah musnah dalam suatu kebakaran di Alamat Risiko.

[26] In his evidence-in-chief for the plaintiff, PW1 Mr. Leng Chee Yean, the sole proprietor of the plaintiff said that the plaintiff only traded in one type of cordyceps, known as the 'King of Cordyceps' (in Chinese) or 'Supreme Grade Cordyceps' (in English). He added that there were 251.3198kg of 'King of Cordyceps' which was either destroyed or damaged by the fire. Valued at USD12,000 per kg, at the exchange rate of USD1=RM3.15466, the total value lost is RM9,513,942.24. The sum claimed at RM9,989,639.35 includes 5% duty tax.

[27] Under cross-examination, DW1 reiterated the fact that the plaintiff only deals in one type of cordyceps, which is known as the 'King of Cordyceps'. Under cross-examination, PW1 also agreed to the suggestion by

learned counsel for the defendant that the onus is on him to prove that the insured property was indeed the 'King of Cordyceps'. The notes of proceedings at p. 60 read as follows:

> TKF: I therefore put it to you that in order to succeed in your claim, you will have to prove or show that the items that were destroyed on the 28.09.11 in the warehouse at Sungai Buloh were in fact King of Cordyceps in Chinese or supreme grade cordyceps in English. Do you agree with me?
>
> LNG: I agree Yang Arif

[28] Therefore, the next issue then is whether the insured property which was destroyed in the fire on 28 September 2011 was actually 251.3198kg of 'King of Cordyceps'.

[29] The plaintiff's only evidence on this issue is that of PW1, who gave oral evidence that 251.3198kg of 'King of Cordyceps' was destroyed in the fire on 28 September 2011. PW1 said that the plaintiff bought the 'King of Cordyceps' from China, as can be seen from the invoice issued by its main supplier in China, Pei Ze Yin. He also said that he had physically examine the cordyceps, and that based on the size and the colour, he can roughly say that he had bought 'King of Cordyceps'. Added to that, from the price that he paid the Chinese supplier, at USD12,000 per kg, PW1 is convinced that his stock that was destroyed by the fire was the 'King of Cordyceps'.

[30] PW1 had also informed the investigator from Forensic Services (M) Sdn Bhd ('Forensic Services'), Mr Yu Ong Sing (DW2) that his stocks that was affected by the fire were 'winter worm/caterpillar summer grass/fungus' or translated as 'cordyceps sinensis'.

[31] However, the defendant contended otherwise. The defendant called two (2) expert witnesses, DW1 and DW2 to give expert opinion on cordyceps and to ascertain whether the insured property that was destroyed in the fire on 28 September 2011 was indeed the 'King of Cordyceps'. The evidence of DW1 and DW2 are based on tests they had conducted on specimens of the fire-affected stocks of the plaintiff.

[32] DW1, Dr. Cheryl Mak Sze Pui is the independent expert witness for the defendant. Together with Professor Kwan Ho Sang and Dr. Loh of the Food Research Centre, The Chinese University of Hong Kong ('CUHK'), they have prepared a report, marked as exh. 'D-16'. The report is titled 'Identification of Cordyceps sinensis using molecular analysis.' The analysis is based on two (2) specimens, 'Specimen 1' and 'Specimen 2' that were sent by Forensic Services to CUHK on the request of Mestari Adjusters.

[33] DW1 and her team did a DNA testing, collecting DNA from Specimen 1, Specimen 2 and two (2) cordyceps samples, namely 'sample 1' and 'sample 2'. In the conclusion part of the report, the CUHK team made the following conclusion:

Sample name	Description	Max identification
Reference sample 1 (fruiting body)	Cordyceps sinensis	99%
Reference sample 2 (fruiting body)	Cordyceps militaris	100%
Reference sample 1 (larva)	Anthocharis scolymus (yellow tip butterfly)	83%
Specimen 1 & 2	Aspergillus oryzae (Chinese character)	98 – 100% (no target genetic material detected)

[34] In her oral evidence in court, Dr. Mak said that there are about 30 authenticated types of cordyceps, and this include 'cordyceps sinensis' and 'cordyceps militaris'. These are all part of the Cordyceps family. Dr. Mak also states that any cordyceps, whether sinensis or militaris or any other type, is a combination hybrid of insect and fungi.

[35] However, from the result of the DNA testing on two (2) specimens of the fire affected stocks that she had conducted, she found that the said specimen contain only fungi (fruiting body part) but no insect (larva part).

[36] In the report (exh. 'D-16'), which she had co-signed together with Professor Kwan Ho Sang and Dr. Loh of the Food Research Centre, CUHK, she had identified those two (2) specimens of the fire affected stocks to be 'Aspergillus oryzae', that is, common mold. She informed the court that no genetic materials of cordyceps were detected in the said specimens. Dr. Mak concludes that the specimens of the fire affected stocks are not even cordyceps, let alone 'King of Cordyceps' or cordyceps sinensis.

[37] Dr Mak's scientific findings are consistent with and supported by DW2, Yu Ong Sing, a consulting scientist with Forensics Services. DW2 was requested by Mestari Adjusters to assess and comment on the fire damaged stocks. DW2 has prepared a report to describe the findings of an assessment into the stock that was involved in the fire. In his report, DW2 said that samples or specimens of the Chinese herbs were collected from the remains of the fire affected stock. As can be seen from photo (7) in the report, the specimens were segregated from the partially burnt or severely brown pieces. There is no issue with regards to the specimen that was collected from the scene.

[38] DW2 had conducted a morphological analysis, which concentrated on the physical features of the fire affected samples and the exemplars which he had procured from the Chinese herb/medicine shops in Malaysia, Singapore and the Philippines.

[39] In his evidence, Mr. Yu said that based on his research, genuine cordyceps sinensis has seven (7) prominent characteristics, namely:

(i) Eight prolegs with the middle four being more easily discernible by the naked eyes;

(ii) There exists rings at the caterpillar, as the herb is a result of fungus invasion of a larvae/caterpillar;

(iii) There would be "eyes" at the head of the cordyceps;

(iv) There is fungus/plant erected from the body of the caterpillar;

(v) When a horizontal cross section is done on the cordyceps, a black line can be found along the length of the body;

(vi) Cordyceps has a long, slim yellowish brown body (caterpillar) with dark plant/fungus on one end; and

(vii) The traverse cross-section of cordyceps sinensis would show a dark colour "V" mark.

[40] By making a comparison of the seven features of the genuine cordyceps sinensis with the affected stock, DW2 found that none of the attributes of the cordycep sinensis can be found in the affected stocks. His findings, as can be seen at p. 11 of his reports are as follows:

Characteristics	**Exemplars**	**Fire site specimens**
Prolegs	Present	Absent
Rings at the body	Present	Absent
Black line along the length of the body (cross sectional; horizontal)	Present	Absent
Dark colour "V" mark cross- (cross sectional; traverse)	Present	Absent
"Eye" at the head	Present	Absent
Cap like fungus erected from the body	Present	Absent

Characteristics	Exemplars	Fire site specimens
Long, slim yellowish brown body (caterpillar) with dark plant/fungus	Present	Absent

[41] Therefore, DW2 is of the opinion that from the morphological analysis, the fire affected stocks of the plaintiff is not the genuine 'cordyceps sinensis' as claimed by the plaintiff.

[42] The findings of DW2 on the morphological analysis is consistent with the evidence of DW1, who said that "From the morphological identification, I found that the fruiting body of Cordyceps sinensis was not observed on both endings of the two specimens and there are no conspicuous caterpillar feet observed from both specimens."

[43] Having considered the evidence of PW1 for the plaintiff and the evidence of DW1 and DW2 for the defendant, I am of the considered opinion that the evidence of both DW1 and DW2, who are independent expert witnesses, together with their reports are more reliable on the scientific analysis of cordyceps than that of PW1, who is an interested party in these proceedings.

[44] This is pertinent when the plaintiff has failed to call any expert evidence to give a scientific analysis of the samples from the fire affected sites. This court cannot simply accept the evidence of PW1, the sole proprietor of the plaintiff, who said that he can ascertain the 'King of Cordyceps' by merely looking at them and/or from buying them at a high price. Buying an item at an expensive price does not necessarily mean that the item is a genuine one.

[45] It is trite law that when faced with a scientific issue, the courts are reluctant to reject uncontroverted expert evidence unless the evidence is 'obviously lacking in defensibility'. In *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681, with regards to expert evidence, Justice Ramly Ali held as follows:

> **The law of expert evidence**
>
> 67. Opinions of experts are admissible to furnish the Court with scientific information which is unlikely to be within the experience and knowledge of a judge. (Section 45(1) of the Evidence Act 1950).
>
> 68. Where expert testimony is required on certain matters including technical matters relevant in allegations of professional negligence (in this case, against a consulting engineer), it is not open to the Court to decide on such matters in the absence of such evidence.

69. In the case of *Syed Abu Bakar bin Ahmad v. PP* [1984] 2 MLJ 19 (FC) Abdul Hamid J (as he then was) held at pg 23:

> It is settled principle that while it is true that a judge who sits alone is entitled to weight all the evidence, to put his own magnifying glass to determine the probabilities so as to speak and form his own opinion or judgment, it would be erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid of expert evidence.

70. PW3's evidence was not challenged at all during cross examination. The Defendant has also not tendered any independent expert to refute or disprove the technical matters contained in PW3's testimony.

71. The *duties of a judge in dealing with unopposed expert witness* are succinctly stated in an extract of *10 Halsbury's Laws of Singapore* [2000] (120.257) which cited in para 26 of the Singapore Court of Appeal's decision in *Saeng-Un Udom v. PP* [2001] 3 SLR 1 (per LP Thean JA) as follows:

> *... The Court should not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences.* While the Court is not obliged to accept expert evidence by reason only that it is unchallenged *(Sek Kim Wah v. PP [1987] SLR 107), if the Court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence.*
>
> In this case, it certainly cannot be said that Dr Lau's opinion was 'obviously lacking in defensibility'. In our opinion, his evidence was based on sound grounds and supported by the basic facts. In the face of such evidence, the Judge, with respect, was not entitled to venture his own opinion on a matter which was clearly 'outside the learning of the court'. In our judgment, in this case, he was not entitled to reject Dr Lau's opinion and substitute it with one of his own.

72. This principle was followed in another Singapore Court of Appeal case, *Dr Lo Sook Ling Adela v. Au Mei Yin Chistina & Anor* [2002] 1 SLR 408 where Chao Hick Tin JA held at para 48:

> ... In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds: see *Saeng-Un Udom v. PP* ... We did not think just because the age (of a tree) given was an estimate, that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge.

73. In other words, the *Court may not reject unopposed expert evidence unless the evidence of the expert is 'obviously lacking in defensibility'.* PW3's evidence in the present case cannot be said to be 'obviously lacking in defensibility'. (emphasis added)

[46] Therefore, premised on the evidence of DW1 and DW2, I am of the considered opinion that the plaintiff has failed to establish, on the balance of probabilities, that the insured property which was destroyed in the fire on 28 September 2011 was actually the 251.3198kg of 'King of Cordyceps'.

[47] The evidence before this court shows that the property destroyed in the fire was not even cordyceps, let alone 'King of Cordyceps' as claimed by the plaintiff. As such, I agree with the submission of the defendant that the fire insurance policy is not triggered to respond to the plaintiff's claim.

Issue: Whether The Plaintiff Has Breached Condition 15 Of The Fire Insurance Policy

[48] In the event that this court is wrong in its finding above, I will proceed to consider whether the defendant's repudiation of the plaintiff's claim is validly made.

[49] It is the defendant's contention that the plaintiff has breached condition 15 of the fire insurance policy which reads as follows:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the wilful act, or with the convenience of the Insured; or, if the claim is made and rejected and an action or suit be not commenced within three (3) months after such rejection, or (in the case of an Arbitration taking place in pursuance of Condition 22 of this Policy) within three (3) months after the Arbitrator or arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited.

[50] It is the submission of the defendant that the plaintiff has breached three (3) limbs of condition 15, namely:

(i) Using false declaration or representation; and/or

(ii) Using fraudulent or false means/documents in support of its claims; and/or

(iii) By submitting a fraudulent claim which is grossly exaggerated.

[51] From the use of the word 'or' in condition 15, I am of the considered opinion that the three limbs in condition 15 is to be read disjunctively, and that the defendant may only show one breach in order to support its decision to repudiate the plaintiff's insurance claim.

[52] It is the evidence of the defendant's witnesses that the plaintiff is claiming for stock loss due to the fire as King of Cordyceps. DW7, who is the manager of the claims department of the defendant, gave evidence that

A the plaintiff is claiming RM10 million for the loss of its cordyceps sinensis or supreme grade cordyceps or king of cordyceps. Indeed, in the statutory declaration affirmed by PW1 on 13 January 2012 to support the plaintiff's insurance claim, the plaintiff has declared that the cordyceps kept at the premise which was damaged by the fire as 'King of Cordyceps'.

B **[53]** DW7 also gave evidence that based on the Chinese University of Hong Kong report dated 14 March 2012 and the Forensic Services (M) Sdn Bhd report dated 5 June 2012, the expert evidence concluded that the fire affected stocks are not 'cordycep sinensis'. The defendant then rejected the plaintiff's insurance claim *vide* a letter from their solicitors dated 13 July 2012.

C **[54]** In view of the expert reports which concluded that the fire-affected stock is not cordyceps, let alone 'King of Cordyceps' as declared by the plaintiff in the statutory declaration affirmed by PW1, I am of the considered opinion that the plaintiff has breached condition 15 by making a false declaration that the cordyceps kept at the premise which was damaged by the

D fire as 'King of Cordyceps'. In the premise, I find that the defendant had validly repudiated liability when the plaintiff has breached condition 15.

[55] Premised on the expert evidence that the fire affected stocks are not cordyceps but common molds, I find that the plaintiff is also in breach of condition 15 by submitting a grossly exaggerated claim, that the fire affected

E stocks is cordyceps sinensis worth more than RM9 million.

[56] Premised on the reasons enumerated above, I find that the plaintiff has failed to prove its case on the balance of probability and that the plaintiff's has breached condition 15 of the fire insurance policy which allows the

F defendant to repudiate the same. Therefore, the plaintiff's case is dismissed with agreed cost of RM100,000.

G

H

I